UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

UNITED SITE SERVICES OF CALIFORNIA, INC.

and **Cases: 20-CA-139280**
20-CA-149509

TEAMSTERS LOCAL 315, IBT

Richard J. McPalmer Esq., and *Elvira Pereda, Esq.,* for the General Counsel.
David S. Durham, Esq., and *Christopher M. Foster Esq. (DLA Piper LLP), Jonathan E. Kaplan, Esq. and Erik Hult, Esq. (Littler Mendelson, P.C.)* for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. This case was tried before me on August 24–27, 2015, in San Francisco, California. Charging Party (Union) filed charges on October 20, 2014, and April 3, 2015, and an amended charge dated May 5, 2015, alleging violations by United Site Services of California Inc. (Respondent) of Sections 8(a)(3) and (1) and 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act). An amended consolidated complaint was filed on July 21, 2015. Respondent filed an answer to the amended consolidated complaint denying that it violated the Act. On March 17, 2016 I issued a decision finding that Respondent violated the Act. After the decision was rendered, the Board issued a decision in *American Baptist Homes of the West d/b/a Peidmont Gardens*, 364 NLRB No. 13 (2016), a case that analyzed and applied *Hott Shoppes* to the permanent replacement of economic strikers, one of the central issues presented in this case. The Board On November 3, 2016, thereafter remanded this case for further consideration in light of its decision in Piedmont and further directed the analysis of other alleged violations of 8(a)(3) and (1) along with an evaluation of whether the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of the Union after receiving a decertification petition. As directed by the Board in its remand the parties were given the opportunity to file supplemental briefs in the matter. After again considering the matter, and based upon the detailed findings and analysis set forth below, I again conclude that the Respondent violated the Act essentially as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that

1. (a) At all material times, Respondent has been a corporation with a place of business at 1 Oak Road, Benicia, California (Respondent's facility), and has been engaged in the business of providing rental portable restrooms, temporary fencing, and sanitation facilities.

   (b) In conducting its operations during the 12-month period preceding July 21, 2015, Respondent purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points outside the State of California.

   (c) In conducting its operations during the 12-month period ending December 31, 2013, Respondent derived gross revenues in excess of $250,000.

   (d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

   (a) Steve Gutierrez- Area Manager
   (b) Aggie T. Haley- Human Resources Manager
   (c) Mark Bartholomew- Senior Vice President of Operations
   (d) Mike Kivett- Reno Area Manager
   (e) David Sattler- Supervisor/Lead Driver

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

United Site Services, Inc. is a company that provides portable toilet and temporary fencing rentals. The company has multiple facilities but this case relates to the facility in Benicia California. The company relies upon employees with varying job titles to perform the work. The company employs the following types of employees:

1) Yard associates- whose work at the employer's facility to wash, inspect, prepare, and repair equipment;
2) Pick Up an Delivery (P&D) driver's-whose duties include picking up and delivering portable toilets, installing holding tanks, and completing any necessary repairs to equipment in the field. P&D drivers must hold a Class C drivers license.

3) Fence drivers- whose duties include the delivery and installation of fence. Fence drivers must hold a Class C driver's license.
4) Fence helper-whose duties are to assist the fence driver's with installation and delivery of fencing materials.
5) Service technicians- whose duties are to drive from site to site pumping out toilets or holding tanks and to clean and restock the portable toilets. Periodically, after the trucks are filled they must return to the facilities to empty their tanks. They must also hold a Class C driver's license.

On September 23, 2013, the Union filed a petition to represent a bargaining unit of the employer's workers. (GC Exh. 2.) On November 21, 2015, the Union won the election. (Jt. Exh. 1.) On January 7, 2014, the Board certified the Union as representative of the following Unit:

> All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer at its 1 Oak Road, Benecia California facility, but excluding Dispatchers, supervisors and guards as defined by the Act. (GC Exh. 3.)

From February to July 2014, the parties engaged in negotiations for an initial contract. The parties held multiple bargaining sessions. In the course of this bargaining, unit employees twice voted on contract proposals. On July 16, 2014, the employer provided its Last Best Final Offer (LBFO). (R. Exh. 2.) On July 23, 2014, the employees unanimously rejected the proposal. (R. Exh. 11–17.) At this same meeting the employees voted to authorize a strike. Despite the authorization to strike the strike did not begin immediately. The employees directed the Union to investigate other options to put pressure on the employer before going on strike. The Union also needed to seek approval from the International Brotherhood of Teamsters for strike benefits. After the efforts by the Union to put pressure on the employer did not yield results satisfactory to the employees, they decided to go on strike. On October 5, 2014, the Union notified the employer that it would strike the next day. (GC Exh. 5.)

The strike at the Benicia facility began on October 6, 2014. It is undisputed that the strike was an economic strike. (Tr. 35:12–13.) At the time of the strike, the unit consisted of 25 active employees and a vacant P&D Driver position. Of the 25 employees 21 of them went out on strike with the majority picketing the entrance to the employer's facility every day of the strike.[1] The employer had in place a contingency plan for the strike which relied upon employees from other facilities to assist and cover the striker's positions. (Jt. Exh.1, GC Exh. 10.) The employer also used temporary employees to cover its Bencia operations who were hired through "Labor Finder's" a temporary employment agency. Also on the first day of the strike, the employer through its human resources manager, Augeda Halley, area manager, Steve Gutierrez, and vice president, Steve Wit began hiring replacements. (Jt. Exh. 1 Stip. 21.) The offers were made for "permanent full time position[s], and to work indefinitely even after the strike ended." (R. Exh. 12–through 12–71). The written offers included the following language

[1] Michael Knutsen, Javier Santiago, Oscar Reyes Perusquia, and Richard Rotti did not join the strike. (Jt. Exh. 1.)

Permanent Position	Name	Offer and Acceptances	
		Verbal Acceptance Date and Time (See Resp. Exh. 14)	**Written Acceptance Date and Time** (See Resp. Exh. 12-1 through 12-74)
Mechanic	Michael Knutsen	10/14, 5:29 PM	10/14, 5:29 PM
Fence Driver	James Matthews	10/6, 4:15 PM	10/6, 4:50 PM
Service Technician	Christopher Orr	10/6, 9:30 AM	10/6, 9:30 AM
Service Technician	Martin Escobar Segura	10/7, 7:15 AM	10/6, 4:15 PM
Service Technician	Francisco Hernandez Rocha	10/7, 7:10 AM	10/6, 4:13 PM
Service Technician	Armando Martinez Saucedo	10/7, 8:40 AM	10/13, 6:00 PM
Service Technician	Alfonzo Meza	10/7, 7:55 AM	10/8, 11:19 AM
Service Technician	Jorge Recinos (or Racinos)	10/7, 9:30 AM	10/8, 9:30 AM
Service Technician	Desiree Martinez	10/10, 5:30 AM	N/A
Service Technician	Paul Barron	10/10, 5:00 AM	10/10, 5:00 AM
Service Technician	Greg Beddoes	10/10, 5:30 AM	N/A
Service Technician	Javier Santiago	10/14, 7:20 PM	10/10, 7:30 PM
Service Technician	Darryl Gaines	10/14, 6:43 PM	10/14, 6:43 PM
Service Technician	Brian Flores	10/16, 1:00 PM	10/16, 1:00 PM
Service Technician	Nicholas Cermeno- Hernandez	10/16, 5:00 AM	10/16, 8:15 AM
Service Technician	Alvin Williams	10/16, 1:29 PM	10/16, 12:29 PM
Service Technician	Kevin Murphy	10/16, 2:50 PM	10/16, 7:00 PM
Yard Associate	Joshua Johnson	10/6, 4:15 PM	10/6, 4:50 PM
Yard Associate	Jesse Hernandez	10/13, 2:15 PM	10/14, 2:41 PM
Yard Associate	Maurice Espinoza	10/16, 7:38 AM	10/6, 9:16 AM
Yard Associate	Julio Campos	10/16, 12:39 PM	10/16, 12:59 PM
Yard Associate	Lester Moreno[25]	10/16, 2:15 PM	10/18, 2:20 PM
Yard Associate	Antoine Frazer	10/16, 2:47 PM	10/17, 7:20 AM
Pick Up & Delivery Driver	Richard Wilkerson	10/8, 3:30 PM	10/14, 7:36 PM
Pick Up & Delivery Driver	Antony Boatmun	10/10, 3:45 PM	10/13, 8:10 AM
Pick Up & Delivery Driver	Michael Neitz	10/14, 1:22 PM	10/14, 1:22 PM
Pick Up & Delivery Driver	James Brown	10/15, 3:20 PM	10/15, 3:57 AM

> You understand and agree that you have been advised that a strike or other active labor dispute exists between USS and Teamsters Local 315 at the Benecia location and that the position offered is as a permanent replacement for a striker who is presently on strike against USS at the Benecia location. You further understand that, as a permanent replacement, if the strike ends, you will not be displaced to make room for the returning strikers. . . . (emphasis in original). (R. Exh. 12–1 through 12–74.)

Included among the written offer was a written offer of acceptance. The document was titled, "Acceptance of Offer of Employment as Permanent Replacement" and contained language similarly to the offer indicating that the employee would "immediately' accept employment as a "permanent replacement" and that the person would not be displaced once the strike ended. (Exh. 12–1 through 12–74.)

The Human Resources Manager Halley began to make offers and kept a log of the dates and times of offers and receipt of written acceptance. The log contained the following information:

Despite the employer's ongoing efforts to hire replacements beginning on the first day of the strike, Respondent did not inform the Union of its hiring efforts until 3:40 p.m. on October 16, 2014. (GC Exh. 6.) The notification which arrived via email advised that the employer had, "hired permanent replacements to fill all of the positions vacated by the striking employees." (GC Exh. 6.)

The next evening on October 17, 2014, the Union held a meeting and discussed the employer's email of October 16, 2014, with the strikers. Upon learning of the employers efforts to hire replacements the strikers chose to return to work. (Tr. 141.) At 6:05 p.m. of that same evening, the Union emailed to Respondent a letter terminating the strike and making an unconditional offer of its employees to return to work. (GC Exh. 7.) On October 18, 2014, Respondent confirmed that there were no unit positions available and advised that the striking employees had been placed on a preferential recall list. The correspondence also requested up to date contact information for all of the strikers. (GC Exh. 8.) On October 22, 2014, the employer sent another email requesting up to date contact information for the strikers. (GC Exh. 9.) On October 23, 2014, the Union replied advising that it would "confirm the correct addresses and provide updates as necessary." (GC Exh. 9.) On October 27, 2014, the Union provided some updated contact information. (GC Exh. 9.)

Respondent, thereafter, put in place its procedures for preferential recall. (R. Exh. 20.) Under its process, the area manager, Steve Gutierrez would make a determination that a position was vacant he would then inform the Human Resources Manager Aggie Halley who would then refer to the preferential recall list and contact two former strikers with the highest seniority. She would contact them by both calling their phone numbers of record and also mailing letters to their address of record. If two employees accepted and only one position was available the position would be offered to the person with the most seniority and the less senior person would remain eligible for preferential recall. If the person did not accept the position then the employer considered their employment relationship ended at that point in time. (Tr. 268, 270.) If Halley found there were no former strikers who held a position to be filled, then Halley would offer it to

a former striker in another position with the understanding that they would still be eligible for preferential recall to their former or substantially similar position. (Tr. 265.)

The first offer of reinstatement went out on December 8, 2015, and continued through June 9, 2015. Sometime in mid-January (a time when only three of the former striking employees had returned to work) a petition was circulated among the employees. The petition contained the following language:

> We the employees of United Site Services a 1 Oak Road, Benicia CA 94510 are hereby giving notice to the Teamsters Local 315 that we do NOT (emphasis in original) want any association or Representation from the Teamsters Local Union 315 effective immediately. (R. Exh. 9.)

The petition was signed by 24 employees and most signed with dates next to their names. Some signed on January 5, 2015, others, January 7, 2015, and two signed on February 11, 2015. Two employees that signed the petition did not indicate the date they signed. (R. Exh. 9.) The petition was delivered by Richard Wilkerson, a permanent replacement employee to the Senior Vice President of Operations Mark Barthholomew. Bartholomew sent the petition to the Human Resources Manager Halley and asked her to verify that the signatures on the petitions matched signatures in the employees' records. (Tr. 433.) Halley conducted the verification process and reported back that in fact the signatures matched. (Tr. 433.) By email dated March 27, 2015, Bartholomew sent a letter to the Union which set forth the following:

> We are in possession of objective evidence that your union no longer represents a majority of the employees at United Site Services a majority of the employees at the United Site Services bargaining unit. Accordingly United Site Services hereby withdraws recognition from your union in this unit effectively immediately. (GC Exh. 12.)

Despite the withdrawal of recognition, Respondent continued to offer reinstatement to former striker's with the last offer being a Service Technician offer made to David Reeves who declined and chose to remain as a P&D driver on June 9, 2015. (GC Exh. 48.)

B. Analysis

1) The Failure to Recall Striking Workers

The court in *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 191–92 (2d Cir. 2006), succinctly set forth the applicable legal standards as follows:

> Section 7 of the Act, 29 U.S.C. § 157, grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See also 29 U.S.C. § 163 ("Nothing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ."). To implement this right, § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an

unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their § 7 rights. And § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer to "discourage membership in any labor organization." Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates § 8(a)(3) unless it can demonstrate that it acted to advance a "'legitimate and substantial business justification[*192].'" See *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967)). The hiring of permanent replacement workers amounts to one such legitimate and substantial business justification. See *NLRB v. Int'l Van Lines*, 409 U.S. 48, 50, 93 S.Ct. 74, 34 L.Ed.2d 201 (1972) ("[A]n employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements."); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n. 8, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983) ("The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of [Fleetwood Trailer] that the employer have a legitimate and substantial justification for its refusal to reinstate strikers.") (internal quotation marks omitted). Consequently, "[w]here employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally." *Belknap*, 463 U.S. at 493, 103 S.Ct. 3172.

It is the burden of the employer to demonstrate that the persons hired are in fact permanent replacements and further the employer must establish a mutual understanding between employer and employee that that they in fact are permanent. *Jones Plastic & Engineering Co*., 351 NLRB 61, 64 (2007). On October 17, 2014, the Union made a written offer to return to work on behalf of all striking employees. Respondent advised that no Unit positions were available because it claimed it had hired twenty seven individuals who it contended were permanent employees. (Joint Ex. 2). As is discussed in more detail below, the evidence established that Respondent failed to meet its burden of establishing that many of the persons it designated as "permanent replacements" were in fact permanent.

a) Desiree Martinez

Desiree Martinez was identified as one of the "permanent replacements." Her credible testimony and the documentary trail of evidence established the opposite. Ms. Martinez was a permanent employee of the company employed at the Respondent's Reno Nevada facility. She was asked by her manager, Mike Kivett to go to work in Benecia to "help" during the strike. She was unaware of the circumstances surrounding the request and assumed it was to help for a special event and did not know she was assisting with the strike. Thereafter, before she left, she was told that she would be crossing a picket line and would be just going there "temporarily." (Tr. 52). At no time did her manager describe the assignment as "permanent" to her. (Tr. 52). At no time did he use the term "permanent replacement" to describe her assignment. (Tr. 52-53). Ms. Martinez credibly testified that she worked in Benicia for a few weeks then returned to Reno worked in Reno for a week and then returned to Benicia. The first time she traveled to Benicia in a company vehicle, the second time the company paid for a car rental. While she was in Benicia she stayed in a motel at the company's expense and received reimbursement for food expenses. When she returned to Benicia the second time, the job assignment was never described to her as "permanent" and she did not understand the job to be permanent in nature. (Tr. 56). During her second period of assignment in Benicia she testified that Steve Gutierrez, a manager while in the yard in Benicia asked her if she wanted to permanently transfer. At the

time she thought he was "just joking around." (Tr. 58). She then testified that he again asked her while in his office if she wished to permanently transfer. She testified that she told him "no." (Tr. 59). She elaborated that the reason she declined the offer to permanently transfer was that her family is in Reno. The documentary evidence of record corroborates her testimony. (See GC Exh. 10). (See also GC Exh. 30) (showing her work after she returned to Reno). Her testimony is also in part corroborated by Respondent's own witness Steve Gutierrez who testified that when given the offer he was told, "she had to think about what's (sic) her husband going to do." (Tr. 485).

The above evidence paints a clear picture that Ms. Martinez was not a permanent replacement and there was no "mutual understanding" of her being a permanent replacement. More importantly, the evidence reveals that not only was she not a permanent replacement but that the employer knew that she was not. She testified that she directly told Gutierrez "no" and the inclusion of her on a list of permanent replacements is a knowing and intentional attempt to not only mislead but also to intentionally block the return of strikers who had requested reinstatement in violation of 8(a)(3) of the Act. The intentional misleading is probative of unlawful motivations and similarly calls into question Respondent's assertions regarding other purported "permanent replacements."

b) Greg Beddoes

Another of the claimed permanent hires was Greg Beddoes who happens to be the father of Desiree Martinez discussed above. Mr. Beddoes like his daughter lived and worked in Reno during the time of the strike. He was also approached by Mike Kivett to temporarily assist in Benicia. Like his daughter, when he was approached he was never told the assignment would be permanent. (Tr. 70). Upon arrival, he was also not told by anyone (including Steve Gutierrez, the manager of Benicia) that the assignment was permanent. (Tr. 70). He also testified that Gutierrez never described his work as that of a "permanent replacement." (Tr. 71). He further testified that after he first reported to Benicia in October of 2014, he returned to work in Reno every other week. (Tr. 71). He further described his assignment as working back and forth between Reno and Benicia working two weeks in Benicia then returning to work a week in Reno. When he arrived in Benicia, he stayed in a hotel at the company expense and was provided reimbursement for food. He testified that his last day of work in the Reno facility was December 28, 2014. He asserted that he was offered permanent work by Gutierrez a couple of weeks after he arrived or "maybe less than a couple of weeks after he got there." (Tr. 74). His response to the offer was that he "had to think about that." (Tr. 74). He testified that eventually he accepted the offer and "signed papers and accepted the job for January 5, 2105." (Tr. 74). Respondent in direct contradiction to Beddoes' testimony contends that he accepted a verbal offer on October 14, 2104, as is evidenced by a hand written notation by Human Resources Manager Halley and signed a formal acceptance letter on that date. (GC Ex. 24). I credit the testimony of Beddoes as truthful regarding his assertion that he told Gutierrez that he would have to think about it and did not accept until much later. It was not until late December and/or early January did Beddoes and Respondent have a "mutual understanding" that he was permanent. The documentary trail and the logical sequence of events also supports Beddoes' version of events. His back and forth work in Reno resembled that of a temporary assignment and his last day of work in Reno on December 28, 2104, supports his version of events. His statement to the Board which was referenced during the trial further corroborates his version. (Tr. 94). Of note is

the fact that the purported Beddoes acceptance letter was dated October 10, 2014, and despite a line referencing date and time of signing was not dated by him. I find that given Beddoes' testimony on this matter, a logical and reasonable inference from this evidence is that the letter was retroactively dated as was Halley's note in a self-serving attempt to obfuscate the true facts of when Beddoes was actually hired in Benicia permanently. This is supported by the admission/stipulation that Halley did not even receive the signed letter until sometime after November 29, 2014. (Tr. 620-623). The evidence surrounding this acceptance letter calls into question the veracity of all of the letters that purport to document acceptance of permanent positions.

It is clear from the above that Beddoes was not hired as a permanent employee until sometime in late December and didn't actually sign paperwork until approximately January 5, 2014. It is also clear that Respondent knew that he was serving in a temporary capacity until that time. In fact the official company time card reports listed him as working for the Reno office up until at least 12/ 19/ 2104. (GC 11). Respondent placing him on the list of permanent replacements when they knew he was serving in a temporary capacity was a knowing and intentional attempt to not only mislead but also to intentionally block the return of strikers who had requested reinstatement in violation of 8(a)(3) of the Act.

c) Richard Wilkerson

Richard Wilkerson was employed by Respondent prior to the strike at the Santa Clara facility. (Tr. 116). He was employed as a Quality Assurance Specialist working in the SJO (San Jose) Field Operations Support Division. (Tr. 348). Respondent contends that Mr. Wilkerson was a permanent replacement and point to an offer letter dated October 8, 2014, and purportedly signed on October 14, 2014. Mr. Wilkerson was not called to testify so there is insufficient credible evidence to establish that in fact the person who signed the letter was in fact him. Nevertheless, the offer of employment clearly stated that his employment was for that of the position of Service Driver. Respondent's own time card records directly contradict the assertion that he assumed the position of Service Driver in October. In fact, the time cards show him assigned to the "San Jose Operations" until December 1, 2014, when his designation is changed from operations to "Service Tech." Similarly, the site designated on the time card as his permanent work site is "SJO" San Jose.

Ana Flores, the Lead Dispatcher, who acted as the supervisor in the absence of Steve Gutierrez overseeing all departments, credibly testified that prior to arriving at Benicia, Wilkerson worked in a quality control function and was "in charge of taking care of "major customers" doing site visits to make sure everything was ok and if the customers complained he would communicate with her about the problems. She testified that the Santa Clara office performed different type of work that the work performed at Benicia which she described as "office personnel." (Tr. 117). She also noted that when he came to Benicia Wilkerson was "helping us out with pickup and delivery. She further credibly testified that on several occasions she was asked by Wilkerson if she had heard "when he was going back to Santa Clara." (Tr. 117). She further testified that he indicated that he had talked to "the person that sent him" and "they weren't telling him anything either." (Tr. 118). She further testified that she relayed Wilkerson's questions to Gutierrez who responded he didn't know when Wilkerson would be returned to Santa Clara. Wilkerson was thereafter returned to Santa Clara in June of 2015.

Respondent's time card records confirm his return and show a change in his Service Tech title to that of Field Ops Support. (GC Ex. 34 p. 8).

The reasonable inferences to be drawn from all of the above is that notwithstanding the "offer letter," in fact Wilkerson was temporarily "borrowed" from Santa Clara to work in Benicia and was later returned to Santa Clara. The testimony of Ana Flores directly supports the conclusion that Wilkerson himself understood that the assignment was temporary and was anxious to return. The fact that he was returned to Santa Clara is even more compelling evidence that his tenure at Benicia was not that of a "permanent replacement." In light of all of the above and specifically 1) the contradictions presented within Respondent's own records which show Wilkerson didn't even assume the position of Service Tech until December which directly contradicts the "offer letter" 2) the Respondent's noted permanent location of his assignments as SJO within the jurisdiction of the location of his initial assignment; and 3) the credible testimony of Ms. Flores; and 4) Wilkerson's return to Santa Clara, I find that Respondent failed to meet its burden of establishing the permanent replacement status of Wilkerson. Moreover, the fact that he was merely "borrowed" and the Respondent used the "offer letter" to cover up his real status when combined with the actions discussed above relating to Beddos and Martinez demonstrates a pattern of willful mendacity calculated to block the return of striking employees in violation of Section 8(a)(3) of the Act. See *3D Enterprises Contracting Corp*. 334 NLRB 57, 77-78 (2001), see also *Dino and Sons Realty Corp.,* 330 NLRB 680, 684-85 (2000).

d) Nicolas Cermano-Hernandez

As was the case with Wilkerson, Respondent asserted that Cermeno-Hernandez was a permanent replacement and signed an acceptance letter dated October 16, 2014. (Joint Ex. 2 Resp. Exh. 12-16 & 17). Mr. Cermeno-Hernandez did not testify and there is insufficient evidence in the record to establish that in fact he actually signed the acceptance letter. According to Respondent's business records, Mr. Cermeno-Hernandez was employed as a seasonal worker with the title of Seasonal Temporary Service Tech at the Respondent's Santa Rosa facility. (GC Exh. 63 p. 5). In the documents referencing his hiring in July of 2014, it was noted that he had been working with Respondent "every season for the last 6 years." (GC Exh. 63 p. 5). The actual Change of Status/Personnel Action Notification form references his status as "seasonal." (GC Exh 63 p. 6). Respondent's time card records reflect that at all times he remained classified as a Santa Rosa Service Tech from at least October through December of 2014. (GC Exh. 11 p. 9-13). The site location was identified in the records as "SRO." (GC Exh. P.9). During the strike he worked at the Benicia yard and drove a truck which belonged to the Santa Rosa facility. (Tr. 114). During this time frame he also worked in Santa Rosa. (Tr. 115-116). Sometime in December, he advised the dispatcher that "his work was done" and he was returning to Mexico. (Tr. 115). On February 23, 2015, an Employee Separation Notice was signed by Respondent's management officials effective March 6, 2015, noting that Cemeno-Hernandez voluntarily resigned due to "personal reasons." (GC Exh. 63 p.8). In June of 2015, Cemeno Hernandez reapplied for work in Sacramento noting that he had previously worked at Benicia until March of 2015, but the reason he gave for leaving was "lay off." (GC Exh. 63 p.11). He was hired as a Seasonal Service Tech effective June 23, 2015 and a Change of Status/ Personnel Action Notification Form was filled out referencing his hire. (GC Exh. 63. P. 12).

Again Respondent's own business records contradict its assertions that Cermeno-Hernadez was a permanent replacement. The reason that appears in his application for reemployment directly contradicts the Respondent's records which assert that he resigned due to personal reasons. A reasonable and logical inference to be drawn from the evidence is that in fact he served at the Benicia location in the same seasonal capacity (as he had previously served for the past 6 years) and that he was similarly laid off because he was a seasonal worker. This conclusion is bolstered by the fact that despite the presence of Change of Status/ Personnel Action Notification forms in the record none appear which would reference his change in status from a seasonal to a permanent employee. The conclusion is also bolstered by the fact that he was rehired in Sacramento as a seasonal employee.

Regardless, the inherent contradictions between Cermeno-Hernandez' application and the Respondent's own time card records (which do not show him permanently assigned to Benicia) make clear that Respondent failed to meet its burden of establishing that he was in fact a permanent replacement. Instead, the evidence points to Cermeno's own understanding that he was laid off as a seasonal employee and was not a permanent replacement. As noted in *3D Enterprises Contracting Corp*. 334 NLRB 57, (2001), "the law is that replacements for economic strikers are presumptively temporary employees, and the burden is on the employer to "show a mutual understanding between itself and the replacements that they are permanent." (citing *Hansen Bros. Enterprises*, 279 NLRB 741(1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987). See also *Towne Ford Inc*., 327 NLRB 193, 204 (1998). Thus, I find that the utilization of Cermano-Hernadez to block the return of striking employees violated Section 8(a)(3) and (1) of the Act.

e) Lester Moreno

Among those employees Respondent listed as a permanent replacement was Lester Moreno who Respondent claimed was hired in the position of Yard Associate. As referenced above, Respondent advised on October 16, 2014 that the company had hired "permanent replacements to fill all vacant positions." (GC Ex. 6). The hiring of Lester Moreno makes clear that this statement was not truthful. On March 17, 2014, the Union sent a letter indicating the termination of the strike and the unconditional offer to return to work. On October 18, 2014, at 11:21 a.m. Counsel for Respondent acknowledged receipt of the letter and indicated "I have confirmed that all the positions have been filled with permanent replacements." (GC Ex. 8). The Respondent's records regarding the hiring of Moreno indicate that he did not even accept a position until October 18, 2014 at 2:20 pm. (Resp. Exh. 12-55). Despite Respondent's assertions on October 16, 2017, that "all vacant positions" had been filled, Respondent knew or should have known that this was not true. Indeed, Moreno didn't even accept the position offered until after the Union sent and the Respondent had by its own admission received the striker's unconditional offer to return to work. Respondent's purposeful attempts to deceive when contradicted by its own records make clear that Moreno was not hired on October 16, 2014, nor was he hired prior to the Respondent's receipt of the unconditional offer to return to work. Respondent failed to meet its burden to establish that this position had been filled by a permanent replacement prior to the unconditional offer to return to work in violation of Section 8(a)(3) of the Act. "See *Home Insulation Service*, NLRB 255 NLRB 311, 313 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981).

f) Antoine Frazer

Respondent contended Antoine Frazer was a permanent replacement hired as a Yard Associate as of October 17, 2014. (Joint. Ex. 2). However the undisputed evidence of record indicates that he did not start his employment until December 8, 2014. (GC. Exh. 11, 64). The reason for the delay in his start was a failed background check which was a condition of his employment. The initial background check revealed an outstanding active warrant. (Tr. 350-351, 591). The Respondent thereafter afforded Frazer a second opportunity to pass a background check and in fact ran a new background check. (GC Exh. 64 p. 5) He was hired after the second background check but it is unclear from the documentary evidence of record whether in fact he passed it a second time. (Resp. Exh. 12-27 GC Exh. 11 p. 64 p.6). I find that at the moment that Frazer failed his background check, Respondent had an affirmative duty to immediately offer the vacant position to one of the striking employees. While in some employment contexts an employer might find it reasonable to leave vacant positions open after background check failures and give potential candidates multiple opportunities to pass background checks, the same is not true, when, as in this case, the employer has an affirmative legal duty to reinstate strikers. In the first instance, it is important to reiterate that striking employees remain employees. *NLRB v. Fleetwood Trailer, Co*., 389 U.S. 375 (1967). Upon Frazer's failure of the background test striking employees with actual job experience and without any similar employment contingencies were waiting to be called back into vacant positions Respondent easily could have made efforts to recall one to fill the position but did not. Respondent's actions are further evidence of the pattern of demonstrated efforts to block retuning strikers. I find the failure to recall a striker to fill the position that became vacant by the failure of the background test violated Section 8(a)(3) of the Act.

g) Oscar Reyes-Perusquia ("Reyes")

Oscar Reyes-Perusquia was an employee who chose to "cross over" and work during the strike. He was employed as a Fence Driver. (Jt. Exh. 1). Respondent contended that he remained in his position as Fence Driver during the strike. General Counsel argued that this assertion was false and that in fact Respondent effectively transferred Reyes into a Service Tech position to block the recall of a Service Tech person into that role. General Counsels position is in fact bourne out by the testimony and documentary evidence of record. The record reveals that instead of serving as a Fence Driver, Reyes worked almost exclusively on Service Route 6 performing Service Tech duties. (GC Exh. 10). Further, it was established that the duties of the particular jobs were separated and it was atypical for Fence Drivers to perform Service Tech work. Ana Flores testified as follows:

Q. Did Service tech employees ever perform fencing work?
A. No.
Q. And did service tech employees ever perform yard work?
A. No.
Q. And what about pickup and delivery drivers did these employees perform service work?
A. No.
Q. Did the pickup and delivery drivers perform fencing work?
A. It was rare.

Q. And did the pickup and delivery drivers perform yard work?
A. No.
Q. The fencing employees do they perform service tech work.
A. No. (Tr. 105).

A reasonable conclusion to be drawn from the lack of any clear documentation transferring Reyes into a Service Tech position permanently is that he was merely temporarily transferred into a Service Tech position and therefore Respondent failed to meet its burden of establishing that in fact he was a permanent replacement in violation of the Act. See *H. & F. Binch Co*., 188 NLRB 720 (holding transferees not permanent therefore unlawful to reinstate strikers). See also *MCC Pacific Valves* 244NLRB 931, 933 (holding that employer was obligated to hire strikers at "initial" vacancies).

2) The Labor Finders Hires

Among those whom Respondent contended were "permanent replacements" included seven individuals who Respondent contended were Labor Finders hires that were permanently converted from temporary positions. This assertion does not withstand scrutiny when the documentary evidence in the record is set against Respondent's assertion that all positions had been filled on October 16, 2014. The Labor Finders time cards and work order records show that after October 16, 2014, seven individuals continued to be employed and paid by Labor Finders (LF). (GC Exh. 17, 18, 18, 19, 56). Most significant is the fact that the timesheets signed by these employees contained the following language, "All temporary employees assigned to Customer by LF("LF Personnel") are employees of LF. LF is responsible for hiring, assigning disciplining, terminating and/or reassigning LF Personnel; and, is solely responsible for establishing, providing, and paying wages and benefits to LF Personnel." (GC Exh. 73). In as much as the Union set forth its unconditional offer to return to work on October 17, 2104, and the seven individuals were still being paid by Labor Finders, and by their own agreements set forth in the signed timecards were still employed by of LF after this date, Respondent failed in its burden of establishing the permanence of these individuals and therefore violated Section 8(3) and (1) of the Act. See *Harvey Manufacturing,* 309 NLRB 465 (1992).

3. **The "Effective Discharge" of 14 Strikers**.

Longstanding Board precedent makes clear that an "effective discharge" results when and employer falsely claims to have permanently replaced economic strikers when in fact it has not. For example, in *American Linen Supply Co*., 297 NLRB 137 (1989), the Board held that an employer who informed lawful economic strikers that they had been permanently replaced when in fact the employer had not obtained such replacements effectively terminated the strikers in violation of Section 8(a)3 and (1) of the Act.

In this case, Respondent knew or should have known that the October 16, 2014, email in which it notified the Union that it had hired permanent replacements to fill "all of the positions vacated the strikers" was false. It was false not only because of those employees it purposely attempted to masquerade as permanent replacement discussed above but also because of the additional seven individuals who were recruited through the temporary employment agency and were similarly not permanent at the time of the Union's unconditional offer to return to work. In

addition, Respondent's own documents taken at face value reveal that both Antoine Frazer and Lester Moreno had not accepted permanent employment as of October 16, 2014 and were not bona fide permanent replacements. (Resp. Exh. 12-27 to 12-29, 12-53 to12-55). I find that Respondent effectively discharged 14 strikers as of the date of its October 16, 2004, pronouncement in violation of 8(3)and (1) of the Act. See Cons*olidated Delivery & Logistics, Inc*., 337 NLRB 524 (2002), enfd. 63 Fed. Appx. 520 (D.C. Cir. 2003). See also *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978).

4. The 5 Employees Determined Ineligible For Recall

Economic strikers who maintain a right to reinstatement nevertheless can be removes from recall consideration if 1) the employer made the striker a valid offer to return to work and the striker rejected the offer, or 2) where the employer can demonstrate that the former striker obtained regular and substantially equivalent employment and unequivocally intends to abandon the job he his struck job. *Carruthers Ready Mix. Inc.*, 262 739 (1982), *Alaska Pulp Corp*. 326 NLRB 522 (1998).

a) Walter Buckner

Walter Buckner was placed on Respondent's preferential recall list on October 18, 2014. (Jt. Exh. 1). No attempt was made to recall him until January 9, 2015. (GC Exh. 48). On or about January 9, 2015, Human Resources Manager Halley claimed she tried to reach Buckner by phone but was unable to leave a message. (Tr. 277). She thereafter sent a letter dated January 9, 2015 which noted that if Respondent did not receive a response by 3:00 p.m. 1/19/2015 the Company would "assume" he did not want the position. (Resp. Exh. 13-18). The letter however was wrongly addressed to a former address despite the fact that Buckner credibly testified that he informed Respondent by telephone of a change in his address and in fact received correspondence at the new address subsequent to his conversation with Respondent's officials. (Tr. 239). Because the letter from Halley was sent to his old address, he didn't receive it until Saturday, January 24, 2015, five days after the expiration noted on the letter by Halley. Upon receipt of the letter he contacted Halley and left a message on her voicemail indicating that he had moved but received the letter and that he wished to accept the job offer. (Tr. 242-243). On Monday January 26, 2015, he then went to the Benicia facility and spoke directly with Steve Gutierrez about the job offer and explained that he wanted to accept the offer. While at the facility on January 26, 2015, he signed the job offer and Gutierrez faxed it back to Halley. (Tr. 244, GC exh.44). Later that day Halley contacted him and advised him that his response was untimely and that the position was no longer available. (Tr. 247). He fully explained that the letter was sent to the wrong address and the delay in his receipt and she indicated that she would speak with someone about it and get back with him. When she called him back approximately 30 minutes later, she advised him that his was response was late and the "position was closed." (Tr. 247). As of January 19, 2014, Buckner was declared ineligible for preferential hire and received no other recall offers. (Jt. Exh. 1, Tr. 248).

In *Easterline Electronincs Corp.,* 290 NLRB 834, 835 (1988), the Board (citing *NLRB v. Betts Baking Co*., 428 F.2d 156, 158 (1970)) noted that in situations regarding the duty to respond to an offer "[B]oth the employer and employee are bound by the requirement of good faith dealings with each other." Unquestionably, Buckner made good faith efforts to accept the

offer very soon after he became aware of it, not only did he call but also went to the facility in person and signed the actual offer. Respondent, on the other hand, violated its duty to act in good faith. Despite Buckner's evidence of the certified mail receipt card that in fact confirmed the truthfulness of his assertions about receipt date of the letter, Respondent refused to take into consideration the delay caused by the mailing of the offer to the wrong address. The time frame given Buckner to respond cannot be said to have been reasonable under the circumstances presented. See *Easterline Electronincs Corp*., *supra* at 835. I separately find given the circumstances surrounding the offer, the lapsing language in the offer i.e. "the company must receive you response no later than 3:00 p.m. on 1/19/2015" also renders the offer invalid. (GC Exh. 44). See for example, *Martell Construction Inc*., 311 NLRB 921 (1993), (concluding that offers were inadequate by virtue of the similar lapsing language). I find that Respondent's removal of Buckner from the recall list under the circumstances set forth above violated Section 8(a)(3) of the Act.

b) Robert Harris

Robert Harris was placed on the preferential recall list on October 18, 2014. (Jt. Exh. 1). On June 11, 2015 an offer letter was sent to Robert Harris regarding a Service Tech position. Like Buckner's letter the offer Harris received contained similar lapsing language i.e. "the company must receive you response no later than 3:00 p.m. on 6/19/2015." (GC Exh. 42). Harris credibly testified that he did not receive any phone calls regarding the recall offer. (Tr. 203). During this time frame Harris was working late hours and was not able to get to the post office during regular post office business hours. He finally received the offer on June 23, 2015. (Resp. Exh. 13-45). After reading the lapse language in the letter, he did not respond to the offer. He credibly testified that he didn't respond because "because it was too late. The day I received it or picked it up would have been passed the date." (Tr. 203). In view of his credible testimony regarding the difficulties he faced retrieving the letter, his credible testimony that he did not receive a phone call which was corroborated (Halley testified she didn't remember calling him the short response time frame given by Respondent (8 days), and his reliance on the lapsing language in not responding when he received the letter after the response date, I find the offer invalid. (Tr. 302). In *Carrutherrs Ready Mix, Inc.*, 262 NLRB 739, 749(1982), the Board considered whether an employer's telephone calls to strikers were sufficient to satisfy the requirements of a valid offer of reinstatement. The Board found that telephone calls alone were insufficient to communicate an offer of reinstatement" if they do not in fact reach the employee." In so holding, the Board noted that an employer is bound to take "all measures reasonably available to it to make known to the striker that he is being invited to work." Although the letter/ phone call facts in this case are juxtaposed to those of *Carruthers* similar reasoning applies. In this situation, Respondent had the correct contact information of Harris available to it and when it did not receive the delivery receipt and knew the letter had not reached him it did not take reasonable steps to inform him that he was being asked to return to work. I find the lapsing language rendered the offer invalid and in the absence of other reasonable steps to inform him rendered his disqualification from recall unlawful and in violation of Section 8(a) (3) of the Act.

c) Ernesto Pantoja

Ernesto Pantoja was placed on the preferential recall list on October 18, 2014. During his tenure he held the position of Utility Driver. He held a Class A professional

driving license which allowed him to perform the highest level driving responsibilities including dump runs. (Joint Exh. 3; Tr. 369). Pantoja was removed from the preferential recall list on or about June 19, 2015. (Joint Exh. 1, GC Exh. 48). The action that precipitated his disqualification from recall was his receipt of a June 11, 2015, letter offering him a position as a Service Tech position. (Resp. Exh. 13-82). He testified that upon receipt of the letter he called Halley immediately and told her "he would rather wait for a position—my position as a utility driver." (Tr. 374). When asked what the differences between the Service Tech and Utility driver he responded, "I think the name says it all. Utility Driver covers all the positions and Service Tech goes to clean the bathrooms of the worksites." (Tr. 374). He further testified that as a Utility Driver he only spent 25 to 30 percent of the time doing what would be classified as Service Tech work. (Tr. 375). In as much as Pantoja was never offered his former or a substantially similar equivalent position his removal from consideration as eligible for recall was improper and violated Section 8(a)(3) of the Act. *Laidlaw Waste Systems Inc*., 313 NLRB 680 (1994).

d) Jorge Rodriguez

Jorge Rodriguez was placed on the preferential recall list on October 18, 2014. He was a Service Tech who was initially offered a Pick Up and Delivery position February of 2015, but declined it. Thereafter, late in February, he was offered a Service Tech Position which he accepted but was not placed into the position because another striker who had more seniority than he was awarded the position over him. (GC Exh. 48; Tr. 291).

Another recall attempt was made on or about April 7, 2015. Respondent sent a certified letter to Rodriguez which was returned as undeliverable. (Resp. Exh. 13-109 to 13-110). Despite the fact that in the past Rodriguez had expressed clear intent regarding his interest in returning to work and the fact that Respondent knew the letter hadn't been delivered to him, Respondent decided to no longer consider him eligible for preferential recall without making any other efforts to contact him. (Tr. 295-296). This decision was unlawful an in violation of Section 8(a)(3) of the Act. See *Alaska Pulp Corp*. 326 NLRB 522, 528 (1998), finding unlawful the termination of reinstatement rights when a letter offering reinstatement was retuned as undeliverable and Respondent made no other efforts to contact despite other available means such as through the Union.

e) Daniel Ruiz

Daniel Ruiz was placed on the preferential recall list on October 18, 2014. He had been employed with Respondent as a Yard Associate. (Joint Exh. 1). An offer of reinstatement was sent out to him on January 21, 2015. Respondent never received a delivery receipt for this offer. Halley never spoke to Ruiz regarding the offer and like Jorge Rodriguez was determined to be ineligible for preferential rehire when no response to the letter was received. No efforts were made to follow up on the letter and Halley never spoke to Ruiz. The reasoning set forth above in *Alaska Pulp Corp*. regarding Rodriguez applies equally to Ruiz. Respondent had other available means to contact Ruiz including through the Union but made no efforts to do so prior to considering him ineligible for recall and was therefore unlawful and violated Section 8(a)(3) of the Act. See *Alaska Pulp Corp*. 326 NLRB 522, 528 (1998)

5. Laidlaw Violations

It is well settled that that strikers who have been replaced by permanent replacements remain employees entitled to full reinstatement upon the departure of the replacements. *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). After each of the five individuals above Buckner, Ruiz, Rodriguez, Harris and Pantoja were unlawfully determined to be ineligible for recall in violation of Section 8(a) (3) of the Act Respondent continued to place persons into vacant positions that they could have been recalled into and again violated the Act. More specifically other Service Tech positions were filled after each was determined ineligible for preferential recall. (GC Exh. 48; Joint Exh.1 Resp. Ex. 21).

6. The Application of Hot Shoppes

While this matter was pending, the Board issued its decision in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016). In its decision, the Board analyzed and provided further guidance regarding the application of the legal principles espoused in *Hot Shoppes Inc.,* 146 NLRB 802, 805 (1964) as it relates to the permanent replacement of economic strikers. The Board noted that, "the permanent replacement of strikers is not always lawful. The Board will find a violation of the Act if it is shown that, in hiring permanent replacements, the employer was motivated by "an independent unlawful purpose." (citing *Avery Heights*, 343 NLRB 1301, 1305 (2004). The Board after analyzing historical precedent concluded that, "the phrase independent unlawful purpose" includes an employer's intent to discriminate or to encourage or discourage Union membership." *Id.* The Board further clarified that "*Hott Shoppes* does not require the General Counsel to demonstrate the existence of an unlawful purpose extrinsic to the strike but, rather only that the hiring of permanent replacements was motivated by a purpose prohibited by the Act."

Applying the Board's reasoning to the facts of this case, I find that the evidence established that Respondent was motivated by an independent unlawful purpose. At the outset it worth mentioning that Respondent maintained what it characterized as a "Non-Union Philosophy." Its Associate Handbook that contains the following passage:

Non-Union Philosophy: United Site Services will do everything in its legal power to prevent any outside, third party, who is potentially adversarial, such as a union from intervening or interrupting the one-on-one communications or operational freedoms that we currently enjoy with our associates. (GC Exh. 29 p. 7.)

Respondent's clear pattern of intentional and unlawful actions described above were a reflection of its stated "Non-Union Philosophy." Contrary to its written policy, the policy that was actually carried out in practice was implemented without regard to whether Respondent violated the law and done so with improper intentions.[2] The actual implementation of Respondent's policy as it took form in Respondent's actions was used and intended to punish

[2] In *American Baptist Home of the West*, the Board recognized what it characterized as, "the "widely accepted" principle that otherwise lawful acts can be rendered unlawful when motivated by improper intentions." *Id. (citations omitted)*.

strikers and discourage Union membership. As noted above, when Respondent notified the Union that it had filled "all vacant positions" it knew or should have known that this was false. This knowledge in and of itself is sufficiently probative of "independent unlawful purpose." The record is however replete with other indicia of unlawful purpose. For example, the affirmative efforts to mask sham replacements as "permanent" when Respondent knew, or should have known, that they were not "permanent" is substantial evidence of unlawful purpose and its efforts to implement its "Non-Union Philosophy." The unlawful effective discharge of 14 employees also smacks of "independent unlawful purpose." So too, the blocking of strikers from returning to the work place and determining them ineligible for recall evidences unlawful purpose. All of the above referenced violations of the Act were in fact efforts which served to punish strikers by not allowing them to return to the positions which they could have immediately occupied after the strike and as will be discussed in more detail part of Respondent's efforts to cause disaffection and cleanse its workplace of the Union. All of these actions when viewed independently and taken together manifest "intent to discriminate" and/or "intent to discourage Union membership" and thus establish "independent unlawful purpose" Applying the principles enunciated by the Board in *American Baptist Homes of the West d/b/a Piedmont Gardens* to the facts of this case, I find Respondent violated the Act.

Standing alone is the unlawful purpose which is evidenced in the timing of Respondent's notification to the Union. Instead of acting in good faith and notifying the Union of its intentions to replace strikers Respondent worked behind the scenes gathering as many persons that it could attempt to pass as "permanent replacements" before providing the Union with any notification. The court in *New England Health Care Employees Union* addressed a question regarding whether the Board properly found that an employer's decision to keep the hiring of permanent replacements secret until the employer could "get as many bodies hired before the union found out" could support the finding of an "independent unlawful purpose." The court noted:

> Absent such countervailing considerations, and even if one adopts the Board's own analytic framework, logic suggests that an employer seeking to enhance its bargaining leverage by hiring permanent replacements would have every incentive to publicize the effort, and that an employer seeking only to prolong its ability to withstand the strike would be indifferent to whether the strikers and the union knew what it was doing. Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret. The replacement of over half of a unionized workforce with nonunion workers would devastate the union's power and credibility. An employer seeking to land such a blow cannot simply announce the hiring of large numbers of replacements, because in order to justify a refusal to allow striking workers to return to work under the "permanent replacement" safe harbor, the employer must have achieved an employment relationship with the permanent replacements somewhere between "a mere offer, unaccepted when the striker seeks reinstatement" and "actual arrival on the job." See *H & F Binch Co. v. NLRB*, 456 F.2d 357, 362 (2d Cir.1972). So an employer seeking to punish strikers and break a union therefore needs enough time to establish an employment relationship with a large number of permanent replacements before the union can react by offering to return to work, and will therefore have a strong incentive to keep the replacement program secret for as long as possible.

Id. at 195–196.

An employer who waits until it has rounded up enough employees to falsely claim all of the positions are filled before notifying the Union of its decision to replace employees creates a "logical implication" that Respondent's decision was the product of an "illicit motive." See *American Baptist Homes of the West d/b/a Piedmont Gardens*, *supra* at n. 15. An employer with an illicit motive of breaking a union has a strong incentive to wait until after it can claim to have hired all of its alleged permanent replacements to notify strikers because once the strikers find out about the decision to replace them they could immediately unconditionally offer to return to work. In this case, the employer began its striker replacement efforts on the first day. Had the strikers been informed on the first day they might have voted to unconditionally return that very same day, possibly even within hours. I find that given all of the evidence of other unlawful acts in this case, Respondent's delay before notifying the Union of its decision to replace strikers was calculated to deny strikers the opportunity of returning to work and an attempt to punish strikers, "discourage union membership" and manifests a desire to interfere with protected activity.

I find examining the totality of the evidence including the evidence specifically referenced in the above paragraphs that General Counsel has sustained its initial burden of showing that an independent unlawful purpose was a motivating factor in the employer's decision to permanently replace economic strikers. Thus, the burden shifts to show that it would have taken the same action even in the absence of unlawful purpose. I find that Respondent has failed in this regard. Moreover, I find its asserted reasons "to minimize training costs, reduce turnover, and maintain customer service levels" are mere pretexts. The reasons set forth by Respondent are simply logically inconsistent with the hiring of replacements. In the first instance, new employees would no doubt incur more training costs as well as the undisputed demonstrated additional costs to convert temporary Labor Finder's employees to permanent status. Secondly, the strikers knew the work, knew the routes and had been performing the work in a satisfactory fashion. Had Respondent been concerned about customer service levels and "turnover" it could have on the first day of the strike disclosed to the strikers its plan to replace them to induce them to abandon the strike and return to work. The reasons advanced by Respondent are simply not credible and don't even address the critical issue of why it waited until it falsely claimed it had filled positions to disclose the hiring of permanent replacements. Thus, I find, that Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate permanently replaced economic strikers upon their unconditional offer to return to work. [3]

[3] Alternatively, I would find that the above described false claims and delay in providing the Union notice of the permanent replacement of strikers is "inherently destructive" of employees' right to strike. See *Great Dane*, 388 U.S. 26 (1967). The right to strike also includes enmeshed within it not only the right to strike but also the right to end the strike and return to work.

7) The Withdrawal of Recognition.

It is established law that "an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Broadway Volkswagen*, 342 NLRB 1244, 1247 (2004) (citations omitted). In determining whether a causal relationship exists between the unremedied unfair labor practices and the loss of union support, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employees disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp*., 271 NLRB 78, 84 (1984). See also, *Beverly Health & Rehab Services*, 346 NLRB 1319 (2006).

Applying these factors here, I conclude that the Respondent's violation of the Act by refusing to recall striking employees would likely cause the Union to lose support among employees. I find that the legion of unfair labor practices, discussed above, would, when viewed objectively, tend cause employee disaffection given that the withdrawal of recognition occurred a mere 10 weeks after the unfair labor practices were committed. I also find that the unlawful refusal to reinstate union strikers and instead employing others not sympathetic to the strike would, when viewed objectively, have the tendency to cause disaffection. Also, the effects of the unfair labor practices were both detrimental and lasted through the time the withdrawal petition was circulated. See *D&D Enterprises*, 336 NLRB 850, 859 (2001). I find strong and compelling objective evidence in the record to show that a mere 10 weeks prior to the unfair labor practices there was a lack of disaffection. The Union won a Board certified election, the union members were actively participating in union affairs and the majority chose to strike with only 4 choosing to cross the picket line. This lack of prior disaffection is strong evidence of the causal connection to the unfair labor practices. See *Bunting Bearings Corp*., 349 NLRB 1070 (2007), holding that causal connection established in part by lack of prior evidence of disaffection. It is apparent that any Union loss of support among employees was causally related to the unfair labor practices discussed above.

In the alternative, I agree with General Counsel's assertion that in view of the fact that all of the replacements are regarded as illegitimate, Respondent cannot demonstrate an actual loss of majority. Discounting the illegitimate replacements, the Unit consisted of 25 employees only 7 of which constitute valid signatures. (GC Br. at 92-93, Jt. Ex 1, ¶¶27,33). I therefore find that the Respondent's withdrawal of recognition of the Union violated the Act.

CONCLUSIONS OF LAW

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

1. The Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the economic strikers upon their unconditional offer to return to work.

2. The Respondent violated Section 8(a)(3) and (1) of the Act by falsely claiming replacements were permanent when in fact they were not.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by "effectively discharging" 14 employees.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by declaring employees ineligible for recall.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by replacing strikers with an independent unlawful motive.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of Local 315 as the bargaining representative of the employees at Respondent's Benicia facility.

Remedy

Having found Respondent has engaged in certain unfair labor practices, I find Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

a) Respondent shall be required to reinstate all Unit employees who engaged in the strike and make whole in all respects for all losses whatsoever resulting from Respondent's unlawful actions and its failure to reinstate the strikers beginning October 17, 2014. Back pay shall be computed on a quarterly basis from the date of the failure to reinstate October 17, 2017, to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall file a report with the Regional Director for Region 20, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey*, 363 NLRB No. 143 (March 11, 2016). The Company shall also Compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum back pay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).[4]

b) Respondent will also be ordered to recognize and bargain in good faith with the Union as the exclusive bargaining representative of the Unit. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union's request rescind such changes and restore the status quo ante and make whole the unit employees for losses

[4] General Counsel argued that "search for work" and "work related expenses" ought to be charged to Respondent regardless of whether the discriminate received interim earnings during the period. As the Board has yet to authorize such as part of make whole relief, I decline to award it as a remedy.

in earnings and other benefits which they may have suffered as a result of such changes.

c) Respondent shall upon resumption of bargaining, bargain in good faith with the Union on request for the period set forth in *Mar-Jac Poultry Co*., 136 NLRB 785 (1962).

d) Respondent shall schedule a meeting during work hours with its employees and in the presence of a Board Agent read the attached notice to employees in English and Spanish. In the alternative, the Respondent shall arrange for a Board agent to read the notice in English and Spanish to employees during work hours in the presence of Respondent's supervisors.

e) Respondent will be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

Order

The Respondent, United Site Services of California, Inc., (Benicia, CA), its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct

(a) Failing to reinstate the economic strikers upon their unconditional offer to return to work.

(b) Discharging strikers upon their unconditional offer to return to work.

(c) Failing and/or refusing to recall employees to their former or substantially equivalent positions of employment.

(d) Terminating employees reinstatement rights after tendering inadequate or invalid offers of reinstatement.

(e) Withdrawing recognition of Local 315 as the bargaining representative of the employees at Respondent's Benicia facility and thus failing to bargain with the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) All strikers shall be offered reinstatement to their former positions if reinstatement has not already occurred and shall make the employees whole in all respects for any loss of earnings and other benefits suffered as a result of the unlawful conduct in the manner set forth in the remedy section of the decision. . Compensate the employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and shall file a report with the Regional Director for Region 20, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(b) Preserve and provide within 14 days at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(c) Recognize and bargain in good faith with the Union as the exclusive bargaining representative of the Unit. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union's request rescind such changes and restore the status quo ante and make whole the unit employees for losses in earnings and other benefits which they may have suffered as a result of such changes.

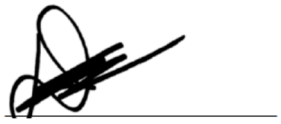
(d) Within 14 days after service by the Region, post at its facility in Benicia County California copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 3, 2017

5



Dickie Montemayor
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

The Teamsters Local 315, IBT is the employee's representative in dealing with us regarding wages, hours or other working conditions of employees in the following unit:

All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer at its 1 Oak Road, Benicia California facility, but excluding Dispatchers, supervisors and guards as defined by the Act

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT fire employees or otherwise discriminate against employees because of their participation in a lawful strike or because of their support for Teamsters Local 315, IBT, or any other labor organization.

WE WILL NOT fail or refuse to reinstate employees engaged in a lawful economic strike, upon their unconditional offer to return to work, where it is shown, as in this case that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT fail or refuse to reinstate employees engaged in a lawful economic strike to their former or substantially equivalent positions, following their unconditional offer to return to work where it is shown, as in this case that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT fail or refuse to recall unreinstated economic strikers to their former or substantially equivalent positions, following their unconditional offer to return to work, when vacancies exist in those positions.

WE WILL NOT terminate our employees reinstatement rights after tendering to them inadequate and invalid offers of reinstatement.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make all strikers whole for any loss of earnings and other benefits suffered as a result of our unlawful actions.

WE WILL, within 14 days from the date of the this Order, offer our employees who went on strike on October 6, 2014, and who have not yet been reinstated, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary any permanent and nonpermanent replacements hired during the strike.

WE WILL make whole the employees who went on strike on October 6, 2014, and who have not yet been reinstated, and the employees who may have been reinstated but whose reinstatement was delayed because a permanent replacement supposedly occupied their position on October 17, 2014, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the this Order, remove from our files any reference to our unlawful termination, termination of reinstatement rights, and/or failure to reinstate the striking employees, and we will, within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful failures will not be used against them in any way.

WE WILL, on request, bargain with the Union as your representative, and for 12 months thereafter as if the certification year had not expired, about your wages, hours, and other working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

UNITED SITE SERVICES
(Employer)

Dated: _____ **By:**_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

NLRB Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-139280 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5130.